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REMODELING
PERSONALIZED KITCHENS, BATHS & ADDITIONS

September 29, 2023

Jessica Stone
SBREFA Chair
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

(Submitted electronically via Regulations.gov)

Dear Ms. Stone:

I would like to thank the Occupational Safety and Health Administration (OSHA) and the Small Business Administration's (SBA) Office of Advocacy for the opportunity to serve as a Small Entity Representative in the review of the potential standard for Heat Injury and Illness Prevention under the processes mandated by the Small Business Regulatory Enforcement Flexibility Act (SBREFA). My comments when referring to the SBREFA Panel or SBREFA process is limited to the potential Heat Injury & Illness Prevention in Outdoor and Indoor Work Settings, and my participation on the SBREFA Panel held September 7, 2023.

My name is Paul Criner, and I serve as Vice President and Co-Owner of Criner Remodeling, a licensed and insured Class A contractor, as well as a family-owned and operated home remodeling company, that has served Newport News, Yorktown, Hampton, Williamsburg and the coastal region of Virginia for more than 45 years. Criner Remodeling has a total staff of 14 employees, nine of which are field workers. Criner Remodeling may be overseeing and/or performing work on five to seven different projects at any given time, so given the small number of field staff, there may be projects where one of its employees is not present to monitor a jobsite.

As the co-owner of a small business working in residential remodeling, I have obtained several certifications to ensure the success of Criner Remodeling including Certified Aging in Place Specialist (CAPS), Certified Green Professional (CGP), and Certified Green Remodeling (CGR).

In addition, Criner Remodeling is considered a small business based on the SBA size standards for the North American Industry Classification System (NAICS) code 236118 – Residential Remodelers. Criner Remodeling generates annual revenues well below the SBA-recognized threshold for small businesses in residential construction. As part of my business, on occasion, I will be out on jobsites working in the field and coordinating projects with my employees and field staff; these projects can be entirely inside a home or have a combination of indoor and outdoor components to the remodel.

Based on my review of the materials I received in preparation for the SBREFA Panel, and participation on a teleconference with other industry representatives, as well as OSHA and SBA representatives, I have concerns with the scope of the potential standard for Heat Injury & Illness for Outdoor and Indoor Work Settings (hereafter "potential Heat Standard"). The following comments address the substance behind the questions that are most relevant to the construction industry and, on occasion, my firm's specific focus on remodeling (i.e., the process of changing or improving the appearance of an outdated, broken, or damaged structure). Both the discussion during the SBREFA Panel and information below reflect my experience in the field in response to the information shared to date by the agency.

The Agency Must Provide Flexibility with any Engineering and Administrative Control Requirements

As discussed during the SBREFA Panel, many of my concerns with a forthcoming heat injury and illness prevention standard are centered around the administrative and engineering control elements listed in the agency's regulatory framework. While I do support some of the options provided in the document to address heat hazards and illnesses, it is highly important for OSHA to recognize the need for flexibility in compliance among small businesses.

A. Engineering Controls Should not be so Limited to Leave Employers Without Effective Options

While I do agree the possible options listed in the agency framework may be effective ways to cool workers as needed, OSHA should not limit itself to a handful of engineering control methods, some of which may be impractical or costly for small businesses. The agency must remember that the residential construction industry is primarily made up of small businesses who construct and remodel the majority of housing annually in the U.S. Like most hazards, the risk of heat-related injury depends on a number of factors, which may not be the same across various industries or even project sizes.

In addition, the resources available to each individual business requires businesses to factor in the geographical differences of their areas along with the type of work being performed, and costs associated with the particular engineering controls. For example, jobsites in the flat plainlands of the Midwest may not have many trees or other opportunities for natural shade; they may also be subject to high winds and render tents useless or impractical. Additionally, certain options may be available or more feasible during the different stages of a project. From my perspective, as a remodeler, for instance, my workers may be able to place an air-conditioned truck in the driveway of the home, but in new construction builds, that vehicle may have to be parked far away from the site during the early stages of building a multifamily or single-family development. Moreover, having an air-conditioned vehicle in close proximity on a remodeling project could itself vary if it is a townhouse or other multifamily location where parking is limited for residents and guests.

It is part of our business' mission to put the health and safety of our employees and the workers on our jobsites first, but the way to achieve that goal is dependent on the different factors unique to every one of our jobs. Therefore, I recommend OSHA implement an approach that allows employers to exercise "reasonable care" that allows businesses of all sizes to work within their means and find the best solutions that work for their workers, job activities, jobsite considerations, etc. While the examples discussed concerned outdoor work sites, the agency should adopt this same flexible approach for indoor work. I cannot emphasize enough that one size does not fit all and can vary markedly from jobsite to jobsite and even for the same employer.

OSHA must also provide a definition and examples which clarify the phrase "as close as practical to the work area" in its proposed rulemaking. As mentioned earlier, different stages of a project and the different tasks on those projects decide the best method of compliance, and as such, the locations of those controls to give workers cool, shaded areas to rest vary. Many framing contractors or roofers cannot simply set up a tent to provide shade without the risk of making the task infeasible or creating a greater hazard. OSHA should not consider distance requirements between the work performed and the location(s) of shaded rest areas, nor should they have a set list of activities that should be considered. The agency should instead allow for flexibility

in where and how employers provide these cooldown areas to maximize harm reduction and reduce further risk or infeasibility.

B. OSHA Should Clarify Its Proposal Regarding Employer-Provided Drinking Water

Currently, we provide water for our employees on days where heat could present a hazard and further supplement those drinks with electrolyte solutions on days our field supervisor considers "high-heat temperatures." We do not have a set initial-heat or high-heat temperature to trigger providing water and other drinks and leave it at the discretion of our field staff. We also encourage the consumption of as much water as needed during those days and give workers the ability to travel to and from a convenience store, grocery store, etc., to refill coolers with ice and more drinks using both a company vehicle and funds to purchase these drinks.

Given our success with this approach, I am concerned over OSHA's proposal to require a specific amount of water for employees to drink in a work shift. Considering the number of your own employees and subcontractors on a jobsite throughout the days, this requirement would be virtually impossible to keep track of each individual worker's consumption, while exposing employers to potential citations and fines through no fault of their own. I support implementing the option outlined in the SBREFA Panel materials that gives employees "ample opportunity to drink water and must be encouraged to frequently consume water or other acceptable beverages" without placing a specific hourly or daily amount of water consumed. Talking again about "reasonable care" for workers, allowing and encouraging drinking water and other replenishing beverages further ensures worker safety and removes the administrative burden that would come with recording water intake throughout the day. As the construction industry already deals with issues that arise simply from being on a multi-employer worksite, I also recommend the standard include explicit language saying an employer – not the general contractor – is directly responsible for providing water to their own employees.

C. Acclimatization and Rest Breaks Should Allow for More than Just a Standard Approach

According to the agency's proposed regulatory framework, OSHA will be considering an option for an employer-developed protocol for both new and returning workers, but the creation of this protocol should also account for the varying natural responses to heat and the acclimatization capabilities among individual workers. Workers may have unforeseen responses to heat by way of medication or other substances in their bodies or underlying health issues, all of which cannot be asked (and may not be known) by the employer under the Health Insurance Portability and Accountability Act and Americans with Disabilities Act, that could occur at any point during the day – regardless of how well acclimatized a worker may be. At the same time, workers who have never worked on a construction site or who have not worked on a site for a long period of time could be very well-acclimated to the climate of that area and there would not be a need for them to follow a set workload schedule as they begin work. Additionally, with so many output-based jobs on a residential construction site, workers may feel incentivized to continue work past a mandatory percentage allowed for a single workday.

Relatedly, a mandated rest break does not take into account different tasks on a jobsite that may need a worker to be constantly tending to that job. Looking at a concrete paver, for example, this skilled worker may be involved in an activity that demands he/she be constantly monitoring the task and is typically paid based on output.

Once a concrete pour begins, a worker must always be managing the pour as well as the drying process in order to prevent cracks or other forms of damage to the concrete. Worker rotation may seem like the best answer for this, but as discussed, there may not be an additional worker – either your own or the subcontractor performing the task – to rotate, which would also raise independent contractor status concerns if a non-employee worker was told what and how to do a particular job. Given how these and other workers are paid, they may also not see any benefit or desire to take a mandated break, putting the employer and/or general contractor in trouble for something solely decided on by the worker. This is particularly true if a subcontractor is on the jobsite for a discrete task that takes less than two hours to complete before they leave for another job elsewhere.

Therefore, if OSHA decides to move forward with a proposed Heat Standard, I urge OSHA to offer options that allow employees to take rest breaks "as needed to prevent overheating." I believe this approach allows employers and employees the best flexibility to best manage their own working conditions on jobsites.

D. Additional Administrative Controls Should be Flexible

OSHA's proposed regulatory framework also discusses options for altering work schedules to fall outside of the peak heat hours or during seasons of high heat. However, these practices are almost near, if not totally, impossible with the constraints placed on our industry's type of work and today's housing demand. The success of our small business depends on taking on projects year-round, so turning down projects during the hotter months (which can be 4-6 months in my region) would greatly impact our employees' livelihood. As our industry also experiences supply chain disruptions and worker shortages, project timelines may be pushed back further than anticipated, to the point where we may be forced to complete a project that continues into the hotter months of the year.

Given the only option for altering work schedules would be scheduling outside of peak hours, local noise ordinances and homeowner associations' policies may prevent early morning or late-night work on outdoor projects and would render any work performed typically before 7:00 in the morning or after 9:00 in the evening impossible with significantly rare exceptions. The agency must provide clear language on which standard takes precedent if an employer can establish a need to work during prohibited hours, as well as a clear definition of what that need is.

Many of our projects have one employee at a site at a time, and despite other panelists mentioning this practice is in place on their sites, a buddy system is likewise entirely infeasible for the size and scope of our business. Similarly, the framework document does not discuss worker rotation as an administrative control, yet if this does become an option that the agency will consider, I believe this option should also have the same conditions as the inclusion of a buddy system. With the proper resources and staff to make these methods feasible, both options are seemingly effective compliance solutions. However, these methods should only be two of many options employers can pick and choose in establishing reasonable care for their employees.

Even Without a HIIPP, Our Current Workplace Practices Have Proven to Mitigate Heat-Related Illness and Injury

Despite there being no required practices to reduce heat injury and illness on our jobsites, we have nevertheless put in place procedures that address this issue. Along with providing water and cool rest areas for workers throughout a shift, our field supervisors assess each jobsite for heat hazards and determine the best course of

action that ensures worker safety, which includes the provisions mentioned above. Further, we currently do not have a written heat injury and illness prevention program (HIIPP) in place; however, our business has not experienced what the agency would consider a recordable incident that resulted from a heat-related injury among our employees.

On the topic of workplace HIIPPs, should OSHA put forth the requirement for a written program, I urge the agency to stay consistent with other written program requirements and exempt employers with fewer than 10 employees from this requirement (*See* 1926.35(e)(3)). While we are very close to the proposed employee threshold, we are fortunate to have either the internal expertise or resources at any given time to create and regularly update a written program, unlike many of the even smaller businesses within our industry who cannot justify these costs when having to communicate the program to such a small number of workers.

OSHA Should Allow for Low-Cost, Effective Hazard Assessment Methods

I recommend the agency not consider the use of the wet bulb globe temperature (WBGT) method for its potential Heat Standard, as the general contractor on a construction site must rely on its subcontractors to have access to and know how to use this method to assess jobsite hazards. The WBGT method, along with other complex methods, could prevent subcontractors from recording accurate measurements, which would likely result in penalties for both the subcontractor and the general contractor.

When assessing the weather for a jobsite, our employees use an easy-to-understand, easy-to-access source such as the National Weather Service mobile app or website for an accurate forecast of that area. I would, therefore, recommend OSHA allow for the same or a similar general weather assessment and heat hazard identification method for jobsites.

The Proposed Recordkeeping Requirements are Overly Burdensome and Should be Revised

Our current practice of daily weather and hazard assessments allows us not to keep records on this information, which we view as having little use and unnecessarily adding to our project costs. For every worker in our company, we also offer a portion of our new hire training, as well as our annual refresher training as the temperatures begin to rise in spring/early summer, which focuses on heat hazard safety and recognizing signs and symptoms of heat stress for themselves and among workers on a jobsite. This practice allows us to convey the critical information needed to reduce the risk of heat-related injury or illness and ensure their safety on our jobsites, all while not having to keep up with records that simply increase burden.

Additionally, keeping records on each worker's training, along with other records related to heat hazard assessment and risk reduction, would be impractical in reality for small businesses in our industry. Specifically, the agency's longstanding Multi-employer Citation Policy has the potential to penalize the general contractor on jobsites for the violations of a subcontractor – even if the general contractor is not aware of and has no control over the violation. My company is small, and I frequently hire subcontractors to do particular projects. This means I am not on every jobsite every day a remodeling project is underway.

Assuming many elements of this standard will have some connection to this policy, the agency would then deem a general contractor equally liable for many of the subcontractors' mistakes, such as failing to train or record training for their workers. In this scenario, and despite the role of a general contractor being to ensure a

subcontractor has the required safety and training programs in place for a project and *not* to train a subcontractors' workers, the onus then falls on the general contractor to ensure subcontractors are compliant simply to avoid receiving a citation themselves. This creates an unreasonable and costly burden on contractors that is unnecessary and unmanageable in practice. Further, placing responsibility on a general contractor to track training for every layer of subcontractor, vendor and supplier that needs required heat training could inappropriately label these independent contractors and separate businesses "employees." For a small business owner, this approach is wholly infeasible and cost prohibitive.

As discussed throughout this letter, OSHA must be very explicit in any proposed standard in placing responsibility on the employer of their respective employees. The agency should also exclude additional recordkeeping requirements on heat stress-related training, acclimatization, and other elements of the proposed standard that would needlessly increase costs for our business and for the residential construction industry in general.

Conclusion

I appreciate the opportunity to serve as a small entity representative during this process to ensure that the residential construction industry through my experience is considered when developing a potential standard for heat injury and illness prevention in indoor and outdoor work settings. I cannot overstate the need for providing flexibility to small businesses and adopting an approach that emphasizes reasonable care for workers. Further, given the uniqueness of the construction industry, I urge the agency to put forth a separate construction standard that provides measures and guidance specific to the industry and where businesses of all sizes and sectors are capable of complying. I look forward to continuing discussions with OSHA and other panel members through this rulemaking process.

Sincerely,

Paul Criner, CAPS CGP CGR
Vice President & Co-Owner
Criner Remodeling

CC: Bruce Lundegren, Office of Advocacy, Small Business Administration
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